BORNEO HOUSING MORTGAGE FINANCE BHD.

v.

NGU KIE CHI & ANOR.

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[CIVIL APPEAL NO. 14 OF 1989]
21 AUGUST 1991

CIVIL PROCEDURE: *Loan - default - Whether there was proper service of demand - Meaning of 'posting' - Schedule H - Whether plaintiffs can proceed with writ action while foreclosure proceedings are pending - Evidence Act 1950, s. 114(e) - Land Rules 1930, rr. 8(1)(a), 14(1).*

The appellants had disbursed a loan to the respondents, secured by a charge on the respondents' land. As a result of the respondents' default in the payment of instalments, the appellants filed an action to recover the outstanding sums, but failed in their application under O. 26A r. 2 of the Subordinate Court Rules for final judgment. This was their appeal against that dismissal.

It was the respondents' contention that:

(a) there was no proper service of demand made to the borrower as the demand notice issued to the respondents *vide* Schedule H of r. 14(1) of the Land Rules 1930 was not sufficient to commence the present legal action. Further, it was argued that the sending of the demand notice was defective as it was sent by AR Registered and

(b) the appellants were wrong to institute a writ of action when the foreclosure action was still under way.

Held:

[1] Service of the notice of demand may be effected in one of two ways, that is by personal service or by posting the notice. Thus, if posting is preferred, this can be done by ordinary posting, and the notices are deemed to have been served on them a day after they are posted. This principle does not constrict 'posting' only to ordinary post.

[2] The appellants here had been served the demand notice by AR Registered and in the absence of an affidavit by the respondents to disclaim receipt of it, the Court by virtue of s. 114(e) of the Evidence Act must presume the postal authorities performed their duties normally and had therefore served the notice in time.

[3] In this case, the foreclosure proceedings had been completed and as the appellants were not able to dispose of the land by auction, they were in Court for the final disposal of their claims. The Court cannot deny the appellants this course of action as this was their way of trying to get repayment of the advances which they had disbursed to the respondents and which respondents had enjoyed.

[4] Further, the appellants' civil action is proper and valid, in accordance with the law and in furtherance of the charge agreement signed between the parties. Clause 14 of the Memorandum of Charge confirms this.

[Appeal allowed with costs.]

Cases referred to:
Public Bank Berhad v. Rasatulin Holding Sdn. Bhd. [1989] 1 MLJ 47 ***(foll)***
Shell Marketing Co. of Borneo Ltd. v. Tan Sri Datuk Wee Boon Ping [1990] 3 CLJ (Rep) 88 ***(foll)***
Lesco Development Corpn. Sdn. Bhd. v. Malaysia Building Society Bhd. [1987] CLJ (Rep) 160 ***(cons)***
Sabah Bank Bhd. v. Benjamin HJ Omar [1991] 3 CLJ (Rep) 682 ***(foll)***
Malaysian International Merchant Bankers Bhd. v. G & C Securities Sdn. Bhd. & Anor. [1988] 1 CLJ (Rep) 793 ***(cit)***
Ewart v. Latta [1865] 4 MACQ 983 ***(foll)***
Bank Bumiputra Malaysia Bhd. v. Esah Bte Abdul Ghani [1985] CLJ (Rep) 41 ***(cit)***
T.O. Supplies (London) v. Jerry Creighton [1952] 1 KB 42 ***(cit)***

Legislation referred to:
Evidence Act, s. 114illus.(e)
Land Rules 1930, rr. 8(1)(a), 14(1)
Subordinate Courts Rules 1980, O. 26A r. 2

Other source referred to:
Stroud's Judicial Dictionary

For the Appellants - Chin Pau Shien; M/s. Skinner Lind Robertson Willie Wong Chin & Co.
For the Respondents - Sugumar Balakrishnan; M/s. Sugumar & Co.

JUDGMENT

Syed Ahmad Idid JC:

This appeal arises from the civil suit no. SCJ37 of 1988 where the learned Sessions Court Judge dismissed the plaintiff's application under O. 26A r. 2 for final judgment on their claims against the 1st and 2nd defendants for:

(i) the sum of RM82,091.72 (the advances standing as at 31 December 1987);

(ii) agreed interest at 12.5% per annum from 1 January 1988 to judgment;

(iii) statutory interest from judgment date to payment;

(iv) legal fees and other costs.

The appeal was heard at the High Court Labuan on 18 June 1991. Miss Chin Pau Shien represented the appellants while Mr. Sugumar Balakrishnan appeared for the respondents.

One starting factor was that the appellants (plaintiffs then) did not demand for the payment of the instalments from the respondents (or defendants then) for several years, that is from 1983 to 1987. It would appear that the first demand was made on 9 February 1988. The monthly instalment, according to the memorandum of charge, was at RM723 the first of such instalment was to have been on 31 August 1981.

The other surprising aspect of this matter was that the defendants (or respondents) executed a memorandum of charge over the land only on 25 March 1985 in favour of the plaintiffs (or appellants here). The memorial no. 00004124 was registered on 14 November 1987. The total loan of RM46,133 had been disbursed several years ago and the interest charges as at 31 December 1987 was at RM39,379.35.

The defendants, in trying to ward off the plaintiffs claims, stated that:

(a) There was no proper service of demand made to the borrower/charger; and

(b) The plaintiffs were wrong to institute a writ of action when the foreclosure action was still under way.

Mr. Sugumar submitted that the notice issued to the defendants *vide* Schedule H was not sufficient to commence the present legal action. Schedule H was issued under r. 14(1) of the Land Rules 1930. However, he also said that 'they (meaning the plaintiffs) sent a demand notice dated 9 February 1988 at p. 39 of the appeal record.' I rule that the 'demand or notice' in writing was equivalent to the notice required to be sent under r. 14(1). See the proviso therein.

By sending the notice of demand required in cl. 8 of the memorandum of charge and r. 14(1) of the Land Rules 1930, was the demand, in compliance with r. 8(1)(a) of the Land Rules 1930, defective if it was sent by AR Registered? Mr. Sugumar was of the opinion it was and he relied on the judgment in *Public Bank Berhad v. Rasatulin Holding Sdn. Bhd.* [1989] 1 MLJ 47.

This Court, and no doubt other Courts too, have had to deal with what is 'posting' and when is a prior demand served? *Stroud's Judicial Dictionary* explains that 'post' ... is wide enough to include both ordinary and registered post and therefore a company is properly served with a writ which is sent by registered post to its registered office (*T.O. Supplies (London) v. Jerry Creighton* [1952] 1 KB 42). It was observed in the case of *Malaysia British Assurance Berhad v. Walltrade Sdn.Bhd. & 3 Ors.* yet unreported *vide* Civil Suit No. K160 of 1989 at High Court Kota Kinabalu that:

> In the *Rasatulin's* case, the learned Judge observed (at p. 48) that service of the notice of demand may be effected in one of two ways, that is by personal service or by posting the notice ... Thus, if posting is preferred, this can be done by ordinary posting ... and the notices are deemed to have been served on them a day after they are posted. Nowhere did the learned Judge constrict 'posting' only to ordinary post. One has to read the depth of the judgment to appreciate the gem in it. It so happened that in the *Rasatulin's* case, both the AR cards were returned with the endorsements "Kembali tidak dituntut." Obviously on that score the Court rightly decided there was no proper and effective service of such notices on the 4th and 5th defendants.

The appellants here had served the demand notice by AR Registered and in the absence of an affidavit by the respondents to disclaim receipt of it, the Court by virtue of s. 114(e) of the Evidence Act must presume the postal authorities performed their duties normally and had therefore served the notice in time. *Shell Marketing Co. of Borneo Ltd. v. Tan Sri Datuk Wee Boon Ping* [1990] 3 CLJ (Rep) 88 was cited. At p. 92, Dato' Mohd. Noor J observed:

> As there is no evidence that these AR Registers had been returned undelivered the service must be presumed to be good and therefore there was proper demand made by the plaintiffs.

This seems to be a good case in favour of the appellants on this point.

Although the *Shell's* case (*supra*) did not consider *Rasatulin's* case, this was not the criterion to disregard it. In essence it stated the law on the point of posting clearly.

The other issue was whether the appellants can take up this action now as they had followed the earlier foreclosure. The respondents cited *Lesco Development Corpn. Sdn. Bhd. v. Malaysia Building Society Bhd.* [1987] CLJ (Rep) 160 and stated that the appellants cannot. The appellants cited *Sabah Bank Bhd. v. Benjamin HJ Omar* [1991] 3 CLJ (Rep) 682 where at p. 685, the Court found at (ii) that the law relevant to this matter was amply stated by Lord Westbury in *Ewart v. Latta* [1865] 4 MACQ 983, 987:

> Until the debtor has discharged himself of his liability, until he has fulfilled his own contract, he has no right to dictate any terms, to prescribe any duty, or to make any demand on his creditor. The creditor must be left in possession of the whole of the remedies which the original contract gave him, and he must be left unfettered and at liberty to exhaust those remedies, and he cannot be required to put any limitation upon the course of legal action given by him by his contract by any person who is still his debtor, except upon the terms of that debt being completely satisfied.

While the *Sabah Bank's* decision is subject to an appeal in the Supreme Court, this Court is of the view that the judgment is sound for to find otherwise would encourage borrowers to renege on their obligations on the flimsiest excuses.

I cannot see any ground on which *Lesco's* judgment can be applicable to our instant case. When one examines carefully, it becomes clear that Held (1) in *Lesco's* is not relevant, and Held (3) is too late to be of any relevance here. As for Held (2), the foreclosure proceedings had been complete and as the plaintiffs (or appellants) were not able to dispose of the land by auction, they are here in Court for their final disposal of their claims. The Court cannot deny the appellants this course of action as this is their way of trying to get repayment of the advances which they had disbursed to the respondents and which respondents had enjoyed since 31 December 1987.

The learned Sessions Court Judge had observed (see p. 6 of the appeal record) that the *Malaysian International Merchant Bankers Bhd. v. G & C Securities Sdn. Bhd. & Anor.* [1988] 1 CLJ (Rep) 793 held that there was no objection to the foreclosure before suing. So the Sessions Court Judge ruled at p. 7 that 'therefore the defence in p. 3 is not sustainable.' This can be further fortified by the Supreme Court decision in *Bank Bumiputra Malaysia Bhd. v. Esah Bte Abdul Ghani* [1985] CLJ (Rep) 41 which gives the sound principles of Malaysian law on this point (and by which this Court is bound at this appeal).

On the two issues which respondents had raised at the trial in the Sessions Court, it is doubtless that:

(i) posting by AR Registered is posting. See "service by post" (Sabah's Interpretation and General Clauses Enactment 1963) where the expression "serve", or the expression "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and unless the contrary is proved, to have been effected at the time at which such letter would be delivered in the ordinary course of post.

(ii) the appellants civil action is proper and valid in accordance with the law and in furtherance of the charge/agreement signed between the parties. Clause 14 of the memorandum of charge confirms this.

This appeal is allowed with costs. There will be no stay of execution as too much time has gone by.

Also found at [1991] 3 CLJ 2848